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Supreme Court of the United States

October Term, 1952.

JOSEPH F. REMELIUS

AND

ANTHONY P. ARANEO, et al,

Petitioners,

For an Order pursuant to Article 78 of the Civil Practice Act,

AGAINST

LAZARUS JOSEPH, as Comptroller of The City of New York, SPENCER C. YOUNG, as Treasurer of The City of New York, CHARLES P. GROSS, Chairman, WILLIAM H. DAVIS and FRANK X. SULLIVAN, as Commissioners constituting the Board of Transportation of the City of New York and THE CITY OF NEW YORK,

Respondents.

PETITION AND BRIEF IN SUPPORT FOR WRIT OF CERTIORARI.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

To the Honorable Judges of the Supreme Court of the United States:

The petition of Joseph F. Remelius and Anthony P. Araneo respectfully shows:

I.

Summary Statement of the Matter Involved.

The petitioners and other similarly situated parties to this proceeding are Civil Service employees of the Board of Transportation of the City of New York who perform various skilled mechanical duties, as carpenters, plumbers, electricians, etc. (R. 53-54, 344, 345). The Board employs approximately ten thousand mechanics and helpers in various categories.

Section 220 of the Labor Law of the State of New York (Labor Law: Cons. Laws, ch. 31 [Laws of 1921, ch. 50], Sec. 220, subd. 3), provides that wages paid to laborers, workmen or mechanics upon public works shall not be less than the "prevailing rate for a day's work in the same trade or occupation in the locality within the State where such public work on, about or in connection with such labor is performed * * * is to be situated, erected or used."

In a prior proceeding to which some of the petitioners herein, as Structural Maintainers in the employ of the Board of Transportation were parties, the highest Court of New York directed that an order issue compelling the Comptroller of the City of New York to fix the prevailing rate of wages for the petitioners therein and those similarly situated, and to make payment thereof. *Matter of Gaston* v. *Taylor*, 274 N. Y. 359 (1937).

Instead of complying with the decision of the Court of Appeals, the City of New York, in 1938, through the Municipal Civil Service Commission, transferred the petitioners' positions, leaving unchanged their qualifications and duties, from ungraded service of the competitive class to graded service of that class, and prescribed specified minimum and maximum wage ranges without regard to the prevailing rate of wages ("Part 39, The Rapid Transit

Railroad Service") (R. 289-293). All other municipally employed mechanics whose respective qualifications and duties in their own specialties were substantially the same, were classified into "Part 38, The Skilled Craftsman and Operative Service," (Rules of Municipal Civil Service Commission, Appendix II) (R. 35) which imposed no maximum limit on wages other than "the prevailing rate." To implement its action, the Municipal Civil Service Commission adopted a series of resolutions which appear in the printed record herein (R. 289-392).

The petitioners herein are among those who are classified into Part 39. They include Structural Maintainers who were before the Court of Appeals in the *Gaston* case. Each of the petitioners filed a verified complaint with the Comptroller of the City of New York requesting him to determine the prevailing rate of wages for their work as required by Sec. 220(3) of the Labor Law (R. 28). The Comptroller refused to entertain jurisdiction upon the ground that petitioners, by virtue of the successive reclassification resolutions adopted by the Municipal Civil Service Commission beginning July 1, 1938, were "graded employees," and as such, could not invoke Section 220 of the Labor Law (R. 31-37). Separate proceedings instituted in the Supreme Court of the State of New York to review the determination of the Comptroller, were consolidated and removed to the Appellate Division of the Supreme Court, First Department (R. 2a-6). The Appellate Division, two Justices dissenting, confirmed the determination of the Comptroller. *Matter of Corrigan* v. *Joseph,* 278 App. Div. 798 (1951) (R. 422). The dissenting Justices voted to remit the matter to the Comptroller to fix the prevailing wage for the period from July, 1938 to February 25, 1943. The order of the Appellate Division was appealed to the Court of Appeals. By a divided court, with a prevailing and dissenting opinion, the Court of Appeals held that

the petitioners were entitled to be paid wages at the prevailing rate, but only up to February 2, 1943, the date of one of the reclassification resolutions deemed to have been valid. *Matter of Corrigan* v. *Joseph,* 304 N. Y. 173 (1952) (R. 424). With respect to the period after February 25, 1943, the Court of Appeals held that by the simple expedient of transferring petitioners' position, without changing their qualifications or duties, from ungraded services of the competitive class to graded services of the same class, with minimum and maximum wages in specified amounts, they could be effectively deprived of their right to the legislatively mandated wages at the prevailing rate.

II.

Jurisdiction.

Jurisdiction of this Court is invoked under 28 USCA, Sec. 1257(3), 8 FCA, Title 28, Sec. 1257(3).

The highest court of New York has decided that petitioners, who are mechanics in the employ of the Board of Transportation of the City of New York, lost their right to wages at the prevailing rate, mandated by the State Labor Law, when their positions in the ungraded service of the competitive class were transferred by the Municipal Civil Service Commission to graded service of the same class. The effect of the decision was to nullify petitioners' rights under the Labor Law and to discriminate arbitrarily between petitioners and other municipally employed mechanics in their respective categories, with similar qualifications and performing similar services whose wages were paid at the prevailing rate.

The rationale of the decision appears to be that persons holding graded positions in competitive civil service cannot have their compensation fixed at the prevailing rate, as the Labor Law directs, without setting at naught

the State constitutional guides—merit and fitness—for the appointment and promotion of civil servants in the competitive class (R. 424).*

The decision was both novel and unexpected, for it marked a radical departure from earlier decisions, which appeared to have settled with finality petitioners' statutory right to be paid wages at the prevailing rate. It had previously been held that the prevailing wage rate provisions of the State Constitution and of the Labor Law applied to publicly employed mechanics (*McAvoy* v. *City of New York*, 52 App. Div. 485 [1900] affd. 166 N. Y. 588 [1901]; *Austin* v. *City of New York*, 258 N. Y. 113 [1932]; *Matter of Walsh* v. *Retirement System*, 274 N. Y. 319 [1937]; *Matter of Heaney* v. *McGoldrick*, 286 N. Y. 38 [1941]; *McKibbin* v. *City of New York*, 269 App. Div. 696 [1945], affd. 295 N. Y. 592 [1946]; *Evadan Realty Corp.* v. *Patterson*, 192 Misc. 850, 855 [1948], affd. 276 App. Div. 751 [1949], lv. to app. den. 300 N. Y. 760 [1950]) in competitive civil service (*Matter of Gaston* v. *Taylor*, 274 N. Y. 359 [1937]), even though their positions were graded (*Matter of Giannettino* v. *McGoldrick*, 295 N. Y. 308 [1946]; *Matter of Smith* v. *Joseph*, 300 N. Y. 516 [1949]); and that wages fixed by statute may not be reduced by administrative officials under the guise of utilizing discretionary powers vested in them by some other statute (*Wright* v. *State of New York*, 223 N. Y. 44, 47 [1918]; *Bressler* v. *Board of Higher Education*, 298 N. Y. 112 [1948]; *Zuckerbrod* v. *Board of Higher Education*, 276 App. Div. 752 [1949], mot. fr. lv. to app. den., 300 N. Y. 765 [1949]). *Matter of Gaston* v. *Taylor, supra*, involving some of these very petitioners, was deemed to have settled any possible doubts concerning the applicability of the Labor Law to municipally employed laborers, workmen and mechanics in competitive civil service.

*304 N. Y. 172, at p. 182.

The only contrary suggestion was made by way of dictum in *Wood* v. *City of New York* (274 N. Y. 155, 159) (1937) which had been decided shortly before the *Gaston* case. No weight was given to the dictum in any of the later decisions of the Court of Appeals cited above. Nor was it accorded any weight when other municipally employed mechanics were graded by the Municipal Civil Service (R. 35) and were paid wages at the prevailing rate, in some instances, at the direction of the Court of Appeals (*Matter of Giannettino* v. *McGoldrick, supra; Matter of Smith* v. *Joseph, supra*).

Notwithstanding these decisions and the practical demonstration by the Municipal Civil Service Commission itself, that positions in competitive service may be graded at "the prevailing rate of wages * * * as determined by law," the Court of Appeals' decision now permits the statutory right of mechanics to wages at the prevailing rate to be granted or withheld at the pleasure of non-elected administrative officials. Thus, under the aegis of this decision, the Municipal Civil Service Commission may discriminate arbitrarily among municipally employed mechanics, whose qualifications, grades, titles and duties are substantially the same, and as to all such mechanics, may completely abrogate the prevailing rate of wage statute, which for more than fifty years, has been the law of New York.

The basis of this decision, which is both new and unexpected, in itself constitutes denial of petitioners' constitutional rights under the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States. Surprised by this unexpected ruling, petitioners, at the first opportunity afforded them, challenged its constitutionality on a motion for a rehearing (R. 446). The motion was denied without opinion (R. 472). In the circumstance, the challenge was timely

(*Sanders* v. *Shaw*, 244 U. S. 317, 320 [1917]; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 313, 320 [1930]; *Great Northern Railway* v. *Sunburst Co.*, 287 U. S. 358, 367 [1932]).

III.

Questions Presented.

May mechanics employed by the City of New York be deprived of their statutory right to be paid wages at the rates prevailing in the locality where their work is performed, by administrative classification of their positions into purported grades which, without taking into account skill, experience, duties or qualifications, fixes minimum and maximum wages in specified amounts, without violating the due process clause of the 14th Amendment to the Constitution?

May mechanics employed by the City of New York be deprived of their statutory right to be paid wages at the prevailing rate in the manner described in the preceding question, while other similarly situated city mechanics are classified into grades at the prevailing rate of wages as determined by law, without violating the equal protection guaranty of the 14th Amendment to the Constitution?

IV.

Reasons Relied on for the Allowance of the Writ.

1. This Court has never passed upon the question whether the due process and equal protection guaranties of the 14th Amendment are infringed when an administrative body such as the Municipal Civil Service Commission of the City of New York, is permitted to nullify the stat-

utory right of city mechanics engaged on public works to wages at "the prevailing rate" by means of a so-called "grading" device used, not to gain any legitimate civil service objective, but solely for the purpose of evading the obligations of the statute, and by means of the same device to make invidious classifications, and purposefully discriminate among similarly situated city mechanics. The highest court of New York has sanctioned such administrative action. The question involving the interpretation of the Constitution of the United States is a federal question of substance.

2. Nullification of petitioners' statutory right to wages at the prevailing rate by arbitrary and capricious administrative action which is purposefully discriminatory violates the due process and equal protection guaranties of the 14th Amendment. *Thompson* v. *Consolidated Gas Co.*, 300 U. S. 55 (1937); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151 (1914); *Royster Guano Co.* v. *Virginia*, 253 U. S. 412 (1920); *Skinner* v. *Oklahoma*, 316 U. S. 535 (1942); *Alston* v. *School Board*, 112 Fed. (2d) 992 (1940), cert. den. 311 U. S. 693 (1940).

3. The decision of the highest court of New York which permits administrative avoidance of the statutory obligation to pay wages to municipally employed mechanics at the prevailing rates, will, if permitted to stand, have far-reaching effects upon public works and upon similarly employed mechanics in New York and elsewhere.

Since 1894, it has been the declared public policy of New York State that laborers and mechanics employed on public works by the State, or any municipal corporation therein, shall be paid wages at the rates prevailing in the locality. This policy benefits both the State and those

employed on its public works. To the State it gives assurance that the work will be done by satisfied workmen at least as skillful as those engaged in private works. To the laborers and mechanics it assures payment of wages at the same level received by others in the locality doing similar work. Essentially, the successive prevailing rate of wages enactments since 1894 express a continuous and continuing "attempt by the State to hold its territorial subdivisions to a standard of social justice in their dealings with laborers, workmen and mechanics." *Austin* v. *City of New York*, 258 N. Y. 113, 117 (1932). The obligations which they create extend to all public authorities. *Matter of Gaston* v. *Taylor*, 274 N. Y. 459, 364 (1937). The policy which they express has become an integral part of our economic and social structure. The benefits which have flown from it are incalculable.

Many other states have enacted similar statutes. As early as 1862 the Congress of the United States recognized the need to conform the rates of wages of employees in Navy yards with those of private establishments in the immediate vicinity of the respective yards (34 USCA, Sec. 505; July 16, 1862, ch. 184, Stat. 587). A general prevailing rate of wages statute was enacted in 1931 (40 USCA, Sec. 276a; March 3, 1951, ch. 411, Sec. 1, 46 Stat. 1494).

The prevalence of these statutes demonstrates the universality of their need and points up the tremendous importance of the Court of Appeals' decision, which permits a non-elected administrative official to brush aside a legislative mandate based upon a deeply intrenched public policy that laborers and mechanics employed on public works shall be paid wages at the rates prevailing in the locality. The importance of the decision is not confined to its immediate effect upon the petitioners. Its effect will be felt throughout the land, for it points the

way to easy frustration of the statutory rights of hundreds of thousands of manual laborers employed on public works. As Judge Fuld noted in his dissenting opinion below:

> "Since the same classification device can readily be applied to all other laborers, workmen and mechanics, the decision opens the door to complete nullification, so far at least as municipal employees are concerned, of the prevailing rate of wage statute, although that statute has reflected the public policy of the state since 1894" (R. 433).*

Withdrawal of the benefits of wage equality among those doing similar work will discourage skilled mechanics from taking public employment and will encourage those in public employ to take their talents elsewhere. This trend, if permitted to develop, will introduce very serious problems in the vast governmental job of constructing, repairing and maintaining public works. Private employers may seize upon the removal of wage parity as an opening wedge for reducing wage scales. Labor unrest, strikes and shortages in skilled mechanics on public works may all combine to destroy the delicate balance between public and private employment which has been maintained over the years by means of prevailing wage rates laws. The situation may become the more critical when defense spending tapers off then it may be deemed necessary for the health of our economy to encourage states and municipalities to embark on essential public works programs.

Another possible consequence of the decision is the encouragement it lends to taxpayers' suits restraining public agencies from hiring contractors who must pay prevailing wages and compelling such agencies to hire "graded" provisional employees to perform the work at lower wages. The extent of the resulting mischief is impossible to foretell.

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*304 N. Y. 172, at p. 186.

The foregoing considerations negative any possible suggestion that the decision of the highest court of New York is of only local concern to a small group of mechanics. On the contrary, if left undisturbed, the impact of this decision will be felt wherever public works are being constructed, repaired or maintained. The decision of the highest Court of New York, involving an interpretation of the Fourteenth Amendment to the Constitution, creates a question of sufficient importance to be settled by this Court.

Prayer.

Your petitioners respectfully pray that the Writ of Certiorari should issue to the Supreme Court of the State of New York in this cause to the end that this Court may review this cause and the same may be determined by this Court as provided by law, and that your petitioners may have such other and further relief or remedy in the premises as to this Court may seem just and proper, and that the said judgment of the Supreme Court of the State of New York, County of New York and the Court of Appeals of the State of New York be reversed by this Honorable Court.

JOSEPH F. REMELIUS, et al.

and

ANTHONY P. ARANEO, et al.,
Petitioners.

By: ROY P. MONAHAN,
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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The memorandum decision of the Appellate Division, First Department, of the Supreme Court of the State of New York (R. 422) is reported in 278 App. Div. 798 (1951). The opinion of the Court of Appeals (R. 424) is reported in 304 N. Y. 172 (1952).

II.

Jurisdiction.

A. The jurisdiction of this Court is invoked under 28 U. S. C. A. Sec. 1257 (3), 8 F. C. A. Title 28, Sec. 1257(3).

B. The order and judgment of the Court of Appeals was made on May 29, 1952 (R. 444). The order of the Court of Appeals denying petitioners' motion for a rehearing was made on October 16, 1952 (R. 472). An order was entered in this Court extending the time for the petitioners to file the preceding petition to and including February 16, 1953 (R. 472).

C. The reasons stated in the preceding petition under IV (pp. 7-11), herewith adopted and made a part of this brief, are believed to constitute sufficient grounds for invoking the jurisdiction of this Court.

III.

Statement of the Case.

A statement of the case has been made in the preceding petition under I (pp. 2-4), which is hereby adopted and made a part of this brief.

IV.

Summary of the Argument.

The arbitrary and discriminatory classification of petitioners into grades at minimum and maximum hourly wage rates in specified amounts without regard to the

prevailing rate of wages, as mandated by the State Labor Law, while other similarly situated mechanics in the employ of the City of New York were classified into grades at prevailing wage rates, is repugnant to the due process and equal protection guaranties of the 14th Amendment to the United States Constitution.

The State Labor Law, as interpreted by the highest court of New York so as to permit such arbitrary and discriminatory classification, is repugnant to the 14th Amendment to the United States Constitution.

Argument.

> The arbitrary and discriminatory classification of petitioners into grades at minimum and maximum specified hourly wage rates without regard to the prevailing rate of wages, as mandated by the State Labor Law, while other similarly situated mechanics employed by the City of New York were classified into grades at the prevailing wage rates, is repugnant to the due process and equal protection guaranties of the 14th Amendment to the United States Constitution.

The present controversy finds its origin in *Matter of Gaston* v. *Taylor,* 274 N. Y. 359 (1937), wherein the Court of Appeals determined that Structure Maintainers in the Board of Transportation of the City of New York in the competitive class, were entitled to the benefits of Section 220 (3) of the State Labor Law, which directs that laborers, workmen and mechanics engaged on public works shall be paid not less than the prevailing rates of wages in the same trade or occupation where their services are performed (Labor Law: Cons. Laws, ch. 31 [Laws of 1921, ch. 50], Sec. 220, subdivs. 3-5).

Instead of complying with the foregoing decision, the Board of Transportation had the Municipal Civil Service Commission adopt a series of resolutions reclassifying Structure Maintainers and some, but not all other mechanics in the Board of Transportation, into "Part 39—The Rapid Transit Railroad Service" in purported grades whose minimum and maximum hourly compensation "is fixed at the maximum and minimum * * * of the several scheduled rates adopted by the Board of Transportation as approved by the Municipal Civil Service Commission from time to time" (R. 291). The first of the series of resolutions was adopted in May, 1938. Shortly before then, all other mechanics in the City's employ, including some employed in the Board of Transportation, had been classified into "Part 38—The Skilled Craftsmen and Operative Service" with grades at "the prevailing rate of wages * * * as determined by law" (Appendix ii).

The Comptroller of the City of New York refused to determine and fix the wages of those holding positions in Part 39 at "the prevailing rate" upon the ground that since their positions were graded at minimum and maximum wage ranges in specified amounts, they were no longer entitled to the benefits and procedures of the Labor Law. The petitioners herein hold positions in Part 39 under varying titles, including Structure Maintainers whose right to wages at "the prevailing rate" was adjudicated in the *Gaston* case. Concededly all of the petitioners are mechanics engaged on public works.

Separate proceedings to review the determination of the Comptroller instituted in the Supreme Court of the State of New York, were consolidated and removed to the Appellate Division, First Department of the Supreme Court. The Appellate Division, two Justices dissenting, confirmed the determination of the Comptroller without opinion (R. 422). *Matter of Corrigan* v. *Joseph,* 278 App.

Div. 798 (1951). The dissenting Justices voted to remit the matter to the Comptroller to fix the prevailing wage for the period from July, 1938 to February 25, 1943. Upon appeal from the order of the Appellate Division, the Court of Appeals, one Judge dissenting, held that a number of resolutions adopted by the Municipal Civil Service Commission prior to February 25, 1943, were ineffective because not properly approved, but that the resolution adopted on February 25, 1943 effectively excluded petitioners from the benefits of the prevailing wage rate provisions of the Labor Law (R. 424). *Matter of Corrigan* v. *Joseph,* 304 N. Y. 172 (1952).

The majority of the Court of Appeals was of the view that petitioners, as graded employees in competitive civil service could not invoke the benefits and procedures of Section 220 (3) of the Labor Law, without nullifying "the Constitutional guides—'merit and fitness'—for the appointment and promotion of civil servants in the competitive class" (R. 433).* The minority opinion, written by Judge Fuld, demonstrates that "mechanics in the city's service can be classified, graded and paid prevailing rates without any conflict between the Civil Service Law and the Labor Law" (R. 433).**

Judge Fuld based his opinion upon the fact that on January 20, 1938 when it classified into Part 38 in grades at "the prevailing rate of wages * * * as determined by law" all mechanics in the City service except those later classified into Part 39, the Municipal Civil Service Commission had shown the practicability of classification and preserving rights to prevailing rates of wages.

There was no conceivable reason for the difference in treatment accorded the positions in these two parts save an atempt to deprive those holding positions in Part 39 of their right under the *Gaston* decision to wages at "the prevailing rate." The positions and services in each part

*304 N. Y. 172, at p. 182.
**304 N. Y. 172, at p. 191.

are called "graded", although in the strictest sense of the term, they are not. There is only one grade of mechanic in each specialty. There could be no promotion within a given group of mechanics or from one group of mechanics to another. The only line of promotion is from mechanical to non-mechanical, such as foremen and supervisors thereby attaining a change in rank. There was consequently no need to fix specified minimum and maximum wage schedules for petitioners' positions, for with respect to their positions there never could be a need to mark out the lines of promotion which follow an increase over the fixed maximum compensation. This irrefutable fact prompted Judge Fuld to say:

> "Therefore, the maximum wage limits of petitioners' grades have no effect upon their eligibility or opportunity for promotion, *except to limit arbitrarily* petitioners' maximum wages to an amount that is less than the prevailing rate for comparable work in the community" (R. 433).*

The positions in Part 39 were not attempted to be graded on the basis of skill, experience, duties or qualifications. Indeed, there was no attempt to grade them on any basis. The only difference in the two parts is that those in Part 38 are paid wages at "the prevailing rate," while those in Part 39 are not. The pattern of grading in Part 38 could have been followed in Part 39. Speaking of this, Judge Fuld said further:

> "The city admits that the positions of petitioners could have been graded similarly. On the other hand, the city claims that the employees now under Part 38—where the compensation of the grades 'is fixed at the prevailing rate of wages * * * as determined by law'—could be reclassified so as to deprive them of the prevailing rate now paid to them. If that is so—and there can be no doubt that it is—

*304 N. Y. 172, at p. 189.

> section 220 ceases to be a state-declared policy (*Austin* v *City of New York,* 258 N. Y. 113, 117), and becomes an act of grace on the part of local officials, to be granted at a whim or withheld by a penstroke. It is difficult, nay impossible, to recognize here the law described by us as legislature-created 'obligation which extends to all public authorities' (*Matter of Gaston* v. *Taylor,* supra, 274 N. Y. 364" (R. 433).*

The quoted statement exposes the dual classification as nothing less than a scheme or device at the administrative level which is as arbitrary as it is discriminatory.

It cannot be said that what was done was pursuant to a policy to include within a single class all of the mechanics in the employ of the Board of Transportation, for other mechanics (Stationary Engineers, Stationary Firemen, Pavers and Rammers) employed by the Board of Transportation, were classified into Part 38 with grades at prevailing wage rates.

Since the purported grading of petitioners' positions at specified minimum and maximum hourly wage ranges was unnecessary and bore no relation whatsoever to legitimate civil service requirements or objectives, there seems no escape from the conclusion that the purported grading was nothing less than usurpation of the legislative function under the color of right in order to evade what the Court of Appeals in the *Gaston* case had termed a legislative-created "obligation which extends to all public authorities * * *." *Matter of Gaston* v. *Taylor, supra,* page 364 (1937).

In sanctioning this administrative action, the Court of Appeals has not declared the Labor Law unconstitutional insofar as it applies to these petitioners. Rather, it appears to have interpreted Section 220 of the Labor Law to mean that all mechanics engaged on public works

*304 N. Y. 172, at p. 195.

shall be paid wages at "the prevailing rate," except those in competitive civil service whose positions the Civil Service Commission chooses to classify into grades at specified minimum and maximum wages, without regard to prevailing wage rates. Under this interpretation, the Civil Service Commission is not obliged to apply the same grades to all within the lines. It may choose from all within the same class those working on a particular project, and remove their positions from the coverage of the Labor Law. Such choice, as this record discloses, need have no foundation other than the intent to avoid the statutory obligation to pay mechanics engaged on public works at "the prevailing wage rates." This is precisely what was done when the choice was made to grade the petitioners' positions into Part 39, leaving within the coverage of the Labor Law all other city mechanics, including some in the Board of Transportation, where petitioners are employed.

That the real reason for the creation of Part 39 was the desire to avoid the obligations of the Labor Law is evident from the circumstance that the first attempt to grade these petitioners at minimum and maximum hourly wages in specified amounts, was made shortly after the decision in the *Gaston* case, which adjudged that some of these very petitioners were entitled to the benefits of the Labor Law notwithstanding their status in competitive civil service. It is also evident from the further circumstance that in the Court of Appeals, the city placed particular emphasis on the fiscal aspects of the problem.

We need not labor the point that it is not the function of the Municipal Civil Service Commission to lend itself to arbitrary and discriminatory classifications for the purpose of avoiding obligations imposed and rights conferred by the Legislature. Nor is it the function of such an agency to concern itself with fiscal problems, which are peculiarly within the province of the Legislature. Nor in

language of Judge Fuld was such an agency ever "considered as a device for wage stabilization" (R. 433).*

The propriety of the classification device countenanced by the Court of Appeals can best be judged by its effect on the petitioners. On February 24, 1943, in common with all other city mechanics, petitioners were entitled to wages at "the prevailing wage rates" under the Labor Law, which since 1894 has expressed the State policy towards laborers, workmen and mechanics engaged on public works. On February 25, 1943, with no change in the Labor Law, this right was taken from them, although they continued to be employed in the Board of Transportation and continued to perform the same services as they had the day before. While their statutory rights were being taken from them, all other city mechanics, including some employed in the Board of Transportation, were left undisturbed in their rights to be paid wages at "the prevailing wage rates." Thus, by an extremely simple device, were the petitioners deprived of rights under the Labor Law, which laborers, workmen and mechanics engaged on public works in New York have enjoyed for more than half a century.

As indicated above, the classification of the positions held by the petitioners into grades with minimum and maximum hourly wages in specified amounts without regard to "the prevailing wage rates," was wholly unrelated to civil service regulation or administration. It was an arbitrary exercise of power devoid of rational basis, aggravated by its unequal application to the petitioners. As such, it offends the due process and equal protection guaranties of the 14th Amendment of the United States Constitution.

There is a vast distinction between the right to public employment, which might not be regarded as a property right subject to constitutional protection, and the right

*304 N. Y. 172, at p. 194.

of public employees to be paid at the statutory rates while the statute which fixes the rates remains unchanged. This proceeding is concerned with compensation earned by petitioners at the rates specified in the Labor Law while engaged as mechanics on public works. This right to earned compensation is a substantial property right of which petitioners may not be deprived without "due process." Due process connotes something more than a mere stroke of the pen. It implies official conduct "within the limits of accepted notions of justice" (*Malinski* v. *New York,* 324 U. S. 401, 417 (1945).

The action of the Municipal Civil Service Commission classifying and attempting to grade petitioners in Part 39, does not measure up to any "accepted notions of justice", for the action was designed, not to accomplish any legitimate civil service objective, but simply to withhold from petitioners the benefits and procedures of the Labor Law to which they were adjudged to be entitled by the decision in the *Gaston* case. The action was arbitrary and capricious and involved an unconstitutional application of the Labor Law. The guaranties embodied in the 14th Amendment extend to State action through its judicial, as well as through its legislative, executive or administrative branch of government. *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673 (1930); *Screws* v. *United States,* 325 U. S. 91 (1945). The decision of the Court of Appeals interpreting the Labor Law so as to permit its unconstitutional application, may be dealt with by this Court. *Fiske* v. *Kansas,* 274 U. S. 380 (1927).

The action complained of was not only arbitrary and capricious, but involved also purposeful discrimination against petitioners in order to escape the obligations of the Labor Law and compliance with the *Gaston* decision. There is no other rational explanation for the device employed by the Municipal Civil Service Commission. Only

those mechanics unnecessarily classified into Part 39 were deprived of the benefits of the Labor Law. All other similarly situated city mechanics were left with their rights under the Labor Law intact. That the other city mechanics are "similarly situated" is not open to question in view of the city's concession that "section 220 of the Labor Law could be completely by-passed by the simple device of classifying every mechanic now listed in Part 38 on a basis similar to that in Part 39" (R. 433).*

The discrimination against petitioners was plainly invidious, and repugnant therefore to the equal protection guaranty of the 14th Amendment. *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151 (1914); *Royster Guano Co.* v. *Virginia*, 253 U. S. 412 (1920); *Skinner* v. *Oklahoma*, 316 U. S. 535 (1942); *Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562 (1949). Petitioners are entitled to have the compensation for the positions which they hold fixed without unconstitutional discrimination on account of their employment on a particular public project. *Alston* v. *School Board*, 112 F. (2d) 992 (1940), cert. den. 311 U. S. 693 (1940).

Conclusion.

It is respectfully submitted that the questions raised in this case are of sufficient importance to require this Court to issue a writ of certiorari to the Supreme Court of the State of New York to review the decision of the Court of Appeals made in the within case.

Respectfully submitted,

ROY P. MONAHAN,
BERNARD A. ABRASHKIN,
Counsel for Petitioners.

*304 N. Y. 172, at p. 190.

APPENDIX I.

NEW YORK STATE LABOR LAW

Sec. 220. HOURS AND WAGES

* * * * *

3. The wages to be paid for a legal day's work, as hereinbefore defined, to laborers, workmen or mechanics upon such public works, shall be not less than the prevailing rate of wages as hereinafter defined. * * *

5. Definitions.

a. The "prevailing rate of wage," for the intents and purposes of this article, shall be the rate of wages paid in the locality as hereinafter defined as to the majority of workmen, laborers or mechanics in the same trade or occupation. In the event that it be determined that there is not a majority in the same trade or occupation paid at the same rate, then the rate paid to the greater number in such trade or occupation shall be the prevailing rate, provided such greater number constitutes at least forty per centum of the laborers, workmen or mechanics engaged in such trade or occupation; in the event there is less than forty per centum of the laborers, workmen or mechanics engaged in the same trade or occupation in the same locality paid the same rate, then the average paid to such laborers, workmen or mechanics in the same trade or occupation shall be the prevailing rate. Laborers, workmen or mechanics for whom a prevailing rate of wage is to be

determined shall not be considered in determining such prevailing wage.

* * * * *

c. The "fiscal officer," as used herein, shall be deemed to be, on public work performed by or on behalf of the state or a public benefit corporation or a county or a village, or other civil division of the state, except a city, the industrial commissioner; and on public work performed by or on behalf of a city, the comptroller or other analogous officer of such city.

* * * * *

7. The fiscal officer as herein defined may, on his own initiative, and must, on a verified complaint in writing of any person interested, cause an investigation to be made to determine the prevailing rate of wages in the same trade or occupation in the locality within the state where such public work is being performed, or the hours of labor performed by the workmen, laborers and mechanics employed on such public work, or both. * * *

APPENDIX II.

RULES OF THE MUNICIPAL CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK

(By Resolution January 20, 1938)

PART 38 (COMPETITIVE CLASS)

THE SKILLED CRAFTSMAN AND OPERATIVE SERVICE

The compensation of the grades of positions in this part is fixed at the prevailing rate of wages for each of them as determined by law.

Able Seaman
Armature Winder
Asphalt Steam Roller Engineer
Asphalt Worker
Auto Lawn Mower Operator
Auto Machinist
Auto Mechanic
(Approved Specialty: Diesel)
Basin Machine Operator
Batteryman
Blacksmith
Blacksmith's Helper
Boiler Maker
Bookbinder
Bricklayer
Bridge Painter
Bridgeman and Riveter
Cable Splicer
Cable Splicer's Helper
Captain (Engineer)

Carpenter
Carriage Painter
Carriage Upholsterer
Cement Mason
Chief Marine Engineer
(Approved Specialty: Diesel)
Clock Repairer
Compositor (Job)
Core Drill Operator
Crane Engineman
(Approved Specialties: Electric; Gas; Steam)
Decorator
Diesel Tractor Operator
Dockbuilder
Door Check Repairer
Door Stop Maintainer
Driller
Electrician
(Approved Specialties: Airport; Automobile; Powerhouse; X-Ray)
Electrician's Helper
Elevator Mechanic
Elevator Mechanic's Helper
Fan Maintainer
Fan and Pump Maintainer
Feeder (Cylinder Press)
Feeder (Job Press)
First Assistant Marine Engineer (Diesel)
Flagger
Foreman, Skilled Workers and Operators
Foreman of Mechanics
(Approved Specialty: Motor Vehicles)
Gas Fitter
Gasoline Roller Engineer
General Mechanic

Glazier
Harness Maker
Horseshoer
(Approved Specialty: Fireman)
Hose Repairer
House Painter
Housesmith
Instrument Maker
Keystone Shovel Engineer
Letterer
Lineman
Lineman's Helper
Locksmith
Low Pressure Fireman
Machine Woodworker
Machinist
Machinist's Helper
Maintenance Man
Marble Setter
Marble Setter's Helper
Marine Engineer
(Approved Specialty: Diesel)
Marine Oiler
Marine Sounder
Marine Stoker
(Approved Specialty: Oil Burning)
Mason's Helper
Metal Lather
Motor Grader Operator
Nickel Plater
Oiler
Painter
Painter (Housing Authority)
Pattern Maker
Paver

Pile Driving Engineer
Pipe Caulker
Plasterer
Plumber
Plumber's Helper
Power Operator
Pressman (Cylinder Press)
Pressman (Job Press)
Printer
Prison Locksmith
Radio Repair Mechanic
Rammer
Rigger
Roofer
Rubber Tire Repairer
Scowman
Seamstress
Second Assistant Marine Engineer (Diesel)
Senior Stationary Engineer
(Approved Specialties: Electric; Electric Pumping Station; Oil Burner)
Sheet Metal Worker
Ship Carpenter
Ship Caulker
Sign Painter
Stationary Engineer
(Approved Specialties: Electric; Electric Pumping Station; Oil Burner)
Stationary Fireman
(Approved Specialties: Coal; Oil)
Steam Fitter
Steam Fitter's Helper
Steam Roller Engineer
Stone Cutter
Striper

Surface Heater Operator
Tailor
Tapper
Taximeter Mechanician
Thermostat Repairer
Tinsmith
Toll Equipment Maintainer
Tractor Operator
Turnstile Repairer
Varnisher
Wehr Grader Operator
Welder
(Approved Specialties: Electric; Gas)
Well Driver

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IN THE

Supreme Court of the United States

October Term, 1952

No. 605

JOSEPH F. REMELIUS

and

ANTHONY P. ARANEO, *et al.*,

Petitioners,

For an Order pursuant to Article 78 of the Civil Practice Act,

against

LAZARUS JOSEPH, as Comptroller of the City of New York, SPENCER C. YOUNG, as Treasurer of the City of New York, CHARLES P. GROSS, Chairman, WILLIAM H. DAVIS and FRANK X. SULLIVAN, as Commissioners constituting the Board of Transportation of the City of New York and THE CITY OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

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Respondents.

BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

Petitioners, employees of the government of the city of New York, ask this Court to review a determination of the New York Courts in regard to their rates of compensation as such City government employees. The New York Courts have concluded that petitioners do not come within the purview of the provisions of a New York statute (Labor Law [Cons. Laws, chap. 31] §220) which deals with the

wage rates of mechanics, laborers and workmen upon public works.

The basis of the determination of the New York Courts is fully and clearly set forth in the Opinion of the New York State Court of Appeals (R. p. 424, *et seq.*; 304 N. Y. 172 [1952]) from which only one of the Judges of that Court dissented. We respectfully refer this Court to that Opinion and will not attempt here to restate the reasons upon the basis of which the New York Court of Appeals reached its determination.

We limit our argument here to three points: (1) The so-called constitutional question, upon the basis of which petitioners seek certiorari, was not presented or raised in the State Courts as required in order for it to be raised here; (2) The sole ground of petitioners' attack is the act of a governmental body which was not and is not a party to this proceeding; (3) In any event no substantial Federal question is presented.

I

The asserted constitutional ground upon which petitioners found their request for certiorari is not timely raised. At no time in the long and complex proceedings in the State Courts did petitioners assert that any provision of the Federal Constitution had been offended against. The very first mention of the Federal Constitution made in this case occurred when, after the New York Court of Appeals (the court of last review in this State) had determined the case adversely to them, petitioners sought reargument and sought to induce that Court to falsely certify that its decision was based upon an interpretation of provisions of the Federal Constitution, which, as a matter of fact, were never before referred to directly or indirectly by any party at any stage of the case (R. pp. 447-466; 467-471). This, the New York Court of Appeals of course refused to do (R. p. 472).

In these circumstances, petitioners are plainly out of court (Cyc. of Fed. Proc. [2 Ed.] Vol. 10, §4980, and cases therein cited at pp. 378, 380, 383-384).

In an attempt to escape from these uniform rulings of this Court, petitioners assert that the decision of the New York Court of Appeals was "both new and unexpected" (Petition, p. 6), and further claim that "at the first opportunity afforded them" they "challenged its constitutionality" (Petition, p. 6).

In the first place, the decision of the New York Courts was neither "new" nor "unexpected". It was an affirmance (with modification) of a decision by the Appellate Division of the New York State Supreme Court, which decision in turn was an affirmance of the determination of a New York administrative tribunal (R. pp. 420-421). Moreover, the holding of the Courts in this case reiterated earlier determinations made by the New York State Courts in other cases; in 1937 (*Wood* v. *City of New York,* 274 N. Y. 155, 159-160) and in 1942 (*In re Wolfe,* N. Y. L. J., October 28, 1942, p. 1222).

In the second place, petitioners had a full and complete opportunity at all times in the State tribunals to assert any Federal constitutional claim which they felt was available. Petitioners framed their own pleadings (R. pp. 8-79); they tried their own case (R. pp. 89 *et seq.*); they conducted their own appeals (R. pp. 1-2; 417, 421; 444; 472), and never once did they attempt to raise a Federal constitutional question. In these circumstances, petitioners' claim to the contrary is false and without foundation. It is submitted that the reason why petitioners did not raise any Federal constitutional question is not that they were not allowed to do so, but that they well knew that there was no semblance of a Federal constitutional question presented in the case.

II

The sole ground upon which petitioners seem to be seeking review here is that the New York City Municipal Civil Service Commission and the New York State Civil Service Commission, by classifying petitioners' positions in Civil Service grades, wrongfully deprived them of advantages which might have been available to them if their positions had not been placed in Civil Service grades. Since the Opinion of the New York State Court of Appeals adequately disposes of this contention, we will add nothing here directed to its merits. We merely point out that the New York City Municipal Civil Service Commission and the New York State Civil Service Commission are not and never were parties to these proceedings and, under the law, their actions cannot be questioned collaterally (R., p. 432 footnote; 304 N. Y. 172, 186, footnote, and cases cited).

III

Entirely apart from the foregoing, it is plain that no Federal constitutional question is presented here. All that is involved in these proceedings is the fixing by State and local officials of New York of the wage rates of government employees, and an interpretation of a statute of the State of New York relating to that subject. Manifestly, such matters are entirely within the competence of the State, its Courts and its agencies (*Dodge* v. *Board of Education*, 302 U. S. 74, 78-79 [1937]; *Butler* v. *Pennsylvania*, 10 How. 402 [1850]; *Wetzel* v. *McNutt*, 4 Fed. Sup. 233 [Dist. Ct., S. D. Ind. 1933]; *Stebbins* v. *Riley*, 268 U. S. 137, 145-6 [1924]). Indeed, if a difference in wage rates of municipal civil servants raised questions under the Due Process clause, or the Fourteenth Amendment, then fiscal and governmental control of states and cities would move from their governments to this Court.

It is submitted that such a notion is so patently worthless as to merit no further consideration. Clearly, no substantial Federal question is presented.

CONCLUSION

The application for a writ of certiorari should be denied.

March 6, 1953.

Respectfully submitted,

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Of Counsel.

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No. 605

Supreme Court of the United States

OCTOBER TERM, 1952.

JOSEPH F. REMELIUS

AND

ANTHONY P. ARANEO, et al,

Petitioners,

For an Order pursuant to Article 78 of the Civil Practice Act,

AGAINST

LAZARUS JOSEPH, as Comptroller of The City of New York, SPENCER C. YOUNG, as Treasurer of The City of New York, CHARLES P. GROSS, Chairman, WILLIAM H. DAVIS and FRANK X. SULLIVAN, as Commissioners constituting the Board of Transportation of the City of New York and THE CITY OF NEW YORK,

Respondents.

REPLY BRIEF IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI.

The brief in opposition to the application herein for a writ of certiorari is grossly misleading in its attempt to convince this Court

1. That the federal question was not timely raised.

2. That petitioners are seeking by indirection to review the action of the New York City and New York State

Civil Service Commissions, who are not parties to the proceeding herein.

3. That petitioners are attempting to confer "fiscal and governmental control of states and cities" upon this Court.

1.

The constitutional grounds assigned by petitioners in support of their application for a writ of certiorari was timely raised upon the motion for reargument in the Court of Appeals. It is settled that "where the grounds of the decision supply a new and unexpected basis for a claim by a defeated party of a federal right", presentation of the federal question for the first time on a petition for rehearing is timely (*Great Northern Ry.* v. *Sunburst Co.*, 287 U. S. 358, 367; Supreme Court Practice Stern & Gressman [1950] 83).

As was pointed out at pages 5 and 6 of the petition for a writ of certiorari herein, and at pages 18 and 19 of the supporting brief, the Court of Appeals for the first time, and contrary to its own prior decisions as practically construed by administrative agencies over an extended period of time, has permitted unconstitutional application of Section 220 of the Labor Law by an interpretation thereof, which deprives mechanics employed on public works of their right to wages at the prevailing rate when administrative officials, vested with discretionary powers by some other statute, choose to reduce wages below the prevailing rate. Until this novel ground for the decision was known, petitioners had no opportunity of raising the federal question. Having raised the question at the first available opportunity, the jurisdiction of this Court attaches.

2.

The proceeding herein was instituted exclusively under the Labor Law. Petitioners, as city mechanics employed on public works, asserted their rights under that statute to be paid wages at the prevailing rate. They complied with the procedural requirements of the statute and requested that the Comptroller, as the fiscal officer of the City of New York, determine the prevailing rate of their wages. Under the statute, only the Comptroller could make the requested determination. The proceeding was initiated for the sole purpose of reviewing the determination of the Comptroller and to compel him to perform the duties conferred upon him by the Labor Law.

The petitioners were not concerned with the manner in which the Civil Service Commission chose to conduct its affairs but solely with the duty devolving upon the Comptroller alone under the Labor Law, to determine the prevailing rate of their wages. In the circumstances, the Civil Service Commission neither was a proper nor a necessary party.

3.

A substantial federal question is presented here. The authorities cited on page 4 of the opposing brief are of no help because petitioners do not question the right of a state or of a municipality to fix the wages of government employees. Petitioners question only the interpretation of the Labor Law under the decision of the Court of Appeals which sanctions its unconstitutional application by arbitrary, capricious, and discriminatory action of a non-elective administrative agency (see p. 20, Petition).

It is difficult to follow the suggestion in the opposing brief that allowance of certiorari in this case would require this Court to exercise "fiscal and governmental

control of states and cities". The suggestion must have been made with tongue in cheek, for the author of the opposing brief must know that this Court has never hesitated in a proper case to prevent infringement by states or cities of the constitutional rights of their citizens.

CONCLUSION.

The application for a writ of certiorari should be granted.

Dated, New York, March 26, 1953.

Respectfully submitted,

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BERNARD A. ABRASHKIN,
Counsel for Petitioners.